The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ARES, Inc.

File: B-224623.2

Date: December 8, 1986

DIGEST

Contracting agency properly may make award to offeror submitting higher cost proposal where cost is of less importance than technical factors and the superiority of the higher cost proposal is reasonably considered by the agency to be worth the price premium.

DECISION

ARES, Inc., protests the award of a cost plus incentive fee contract to General Electric under request for proposals (RFP) No. F08653-84-R-0016, issued by the Department of the Air Force for the development of advanced gun technology (AGT). The AGT program is a two-phase program to develop gun and ammunition technology capable of use with cased telescoped ammunition in future fighter aircraft. The Air Force is seeking simple, compact gun designs which would permit muzzle velocities of 5,000 feet per second.

Phase I of the AGT program was procured in August 1984 and awards were made to two offerors, GE and ARES, as primary contractors for the gun design. Ford Aerospace was the common subcontractor for ammunition development. The phase I contracts provided for a "downselect" competition between ARES and GE after completion of phase I, to determine the awardee for the phase II contract for final gun design, gun and ammunition fabrication, and testing. The RFP evaluation factors for the award decision were phase I technical, management and cost performance and the phase II cost proposal in descending order of importance.

On April 10, the Air Force issued the phase II RFP to ARES and GE, requesting cost proposals for phase II and a self assessment of their phase I performance. The Air Force

evaluated the offers, held discussions, and then requested, received and evaluated best and final offers. Based on the evaluations, the source selection official decided to award to GE, the technically superior, higher cost offeror. ARES protests this decision.

We deny the protest.

ARES asserts that it met or exceeded all stated evaluation criteria and claims it was downgraded for requirements not contained in the RFP. ARES points out that the Air Force's failure to find it technically superior and to award it a contract is inconsistent with the agency's earlier decision to impose a secrecy order on ARES' patent application allegedly because ARES' design was too valuable to permit disclosure outside the United States Government. Further, ARES argues it was downgraded on the basis of an improper "cost risk" assessment because of alleged phase I overruns which it argues were attributable to the subcontractor Ford and, in any event, also properly should have been assessed equally to GE which also subcontracted with Ford. ARES thus believes award to GE at a higher cost was unjustified.

Initially, we note that ARES objects to the Air Force's refusal to furnish it with the source selection documents. ARES states it received limited information at the debriefing and objects to the Air Force's "selective" discussion of documents contained in the contracting officer's report. Under section 3553(f) of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (Supp. III 1985), the contracting agency has the primary responsibility for determining which documents are subject to release. Harbert International, Inc., B-222472, July 15, 1986, 86-2 C.P.D. ¶ 67. The Air Force has submitted the source selection documents to this Office for our in camera review in connection with the protest. Our discussion of the contents of such material is necessarily limited because of the agency's restriction on their disclosure. Corporate Health Examiners, Inc., B-220399.2, June 16, 1986, 86-1 C.P.D. ¶ 552.

The record shows that the source selection officer concluded that GE's superiority in the technical area and slight superiority in the management area outweighed the cost savings of an award to ARES. The RFP made clear that technical and management factors were more important in the award selection than phase II proposed costs. The agency advises that even if the protester's proposed costs were accepted as realistic, the protester still would not have been selected for award due to the superior performance demonstrated by the awardee during phase I which was of greater importance than cost.

Where a solicitation for a negotiated procurement advises offerors that technical considerations are more important than cost, the contracting agency properly may conclude that it is more advantageous to the government to award to a technically superior offeror, even though its price is higher than that of other technically acceptable offerors, if the lower prices are offset by the advantages of the technically superior offer. Wolf, Block, Schorr & Solis-Cohen, B-221363.2, May 28, 1986, 86-1 C.P.D. ¶ 491. Consequently, an offeror is not automatically entitled to award merely because it offered the lowest price. Henderson Aerial Surveys, Inc., B-215175, Feb. 6, 1985, 85-1 C.P.D ¶ 145. The government is not obligated to make award to the low cost offeror in a negotiated procurement, unless the solicitation specifies that cost will be the determinative factor. Rather, an agency may conclude, consistent with the evaluation criteria, that an award to a higher-priced offeror is warranted where its advantages outweigh the cost savings offered by lower-priced technically acceptable offer. Wolf, et al., B-221363.2, supra.

ARES challenges the agency's conclusion that GE was technically superior and asserts that the agency improperly evaluated ARES' offer. ARES first contends that the Air Force failed to give proper weight to the potential of ARES' gun as allegedly required by the selection criteria. The Air Force essentially responds that it evaluated all elements that had a legitimate bearing on offerors' phase I performance as it related to the offerors' ability to successfully complete phase II. The Air Force points out that the RFP required ARES to develop a detailed gun design in phase I which met the statement of work and asserts that it properly downgraded ARES for phase I objectives which were not met or where the phase I performance raised doubts about ARES proposed phase II performance.

The record indicates that the Air Force gave ARES credit for the potential of its "flight weight gun." ARES was favorably evaluated for its potential to achieve design rate of fire, time-to-rate, time-to-first-shot, and minimization of gun mechanism weight. However, ARES' offer was found deficient or downgraded with regard to the actual ammunition design validation test, phase I muzzle device design and performance, its ammunition handling system and ARES' choice of barrel and chamber devices for phase I. The Air Force reports that ARES' performance concerning these factors necessarily influenced the Air Force's evaluation of ARES' potential to perform in these areas under phase II.

Initially, ARES argues it was improperly evaluated on the ammunition design validation test under phase I. The RFP

required that the ammunition design validation test be conducted at the design rate-of-fire of the contractor's detailed gun design. The Air Force's objective for rate-of-fire was 6,000 shots-per-minute (spm) and ARES' gun was designed to meet this objective. The Air Force reports that ARES' gun fired one 24 round burst where a 5,900 spm was achieved, and that only the last two to three rounds in that burst were fired at a rate over 5,400 spm. The Air Force further states that fewer than 5 rounds were shot at rates exceeding 5,400 spm of the 549 rounds fired by ARES during the ammunition design validation test. The Air Force reports that the limited number of rounds above the 5,400 level did not provide a statistical basis to permit giving ARES credit for rates higher than 5,400 spm. The Air Force thus credited ARES for meeting the 5,250 to 5,400 spm level.

ARES concedes that it did not reach the 6,000 spm design rate of fire. However, ARES contends that it was discouraged by the Air Force program manager from firing at the higher rate and that the program manager led ARES to believe its test had met all objectives. ARES also claims that the amount of ammunition available was less than projected by the Air Force and this ammunition shortage hampered further testing at higher firing rates.

Initially, we note that the record indicates that GE and ARES received the same 600 rounds of ammunition and thus GE and ARES were given the same amount of ammunition for this test and that both contractors had the same amounts for conducting the test.

Concerning the program manager's statements, the program manager denies that he stated or implied that the test level of firing was acceptable. He states that he only congratulated ARES for completing the live fire test.

ARES also admits that it was aware of the 6,000 spm level requirement during the test. ARES states that it intended to meet the requirement notwithstanding the ammunition limitations, but that the program manager, in effect, orally agreed to waive this requirement. However, even assuming the program manager made the statements alleged by ARES, it is well settled that where a solicitation provision clearly puts offerors on notice not to rely on the oral representations of agency personnel, an offeror relies upon such advice at its own risk. SysteMetrics, Inc., B-220444, Feb. 14, 1986, 86-1 C.P.D. ¶ 163. Here, the contract provided that only the contracting officer was authorized to make contractual changes and such changes only could be accomplished by issuance of a change order or agreements in writing signed by the contracting officer. Thus, even if the program manager did make the above representations, ARES followed this advice

at its own risk, and the government was not bound by it in its subsequent evaluation of ARES' technical performance.

We also note that under the RFP evaluation scheme, the Air Force properly could downgrade ARES for not actually achieving the 6,000 spm level. In our view, while the Air Force credited ARES for its potential to meet this requirement, the Air Force properly downgraded ARES for actual phase I technical performance since it was clearly an important evaluation factor, in itself, and also provided a reasonable basis to project ARES' ability to actually deliver on its demonstrated potential.

ARES also argues the Air Force improperly found ARES deficient with respect to the ammunition handling system. ARES asserts that the ammunition handling system was "expressly excluded from development during this program" by the contract. ARES states that the contract contemplated the use of simplified engineering test units for the phase I ground test of the telescoped ammunition gun.

The Air Force responds that it downgraded ARES in this area only in terms of those concerns that were legitimately associated with phase I performance. The Air Force reports that it concluded that ARES' concept was weak as to potential for minimization of weight and volume. The Air Force further states that ARES' design, specifically its size structure and configuration, raised doubts as to its suitability for actual usage in an aircraft gun system.

The RFP statement of work provides that:

> "The simplified test feed mechanism shall be designed to transfer live cartridges to the gun and receive fired cartridges from the gun in a manner consistent with methods which would be employed in the design of feed unit suitable for actual usage in an aircraft gun system."

The RFP further requires the "interface" of the gun with simplified engineering test units for the gun feed and gun drive mechanisms.

We recognize that the design work for the ammunition feeder system was designated primarily as phase II work. However, since the RFP required ARES to demonstrate interface of the gun with the test unit consistent with methods which would be used to design feed units suitable for actual usage in an aircraft gun system, we view the RFP as reasonably allowing consideration of an offeror's test unit design to evaluate the actual and potential capacity of the ammunition handling system to interface with the gun and the suitability of the

design for actual usage in an aircraft gun system. Under these circumstances, we cannot object to the Air Force's findings in this regard.

ARES also objects to the Air Force penalizing it with respect to barrel design and materials. The record indicates that the Air Force downgraded ARES for not proposing a workable barrel design and material for its gun which would allow the gun to meet RFP requirements. ARES contends that barrel technology was not the subject of this contract. ARES asserts that the Air Force, in fact, is developing gun barrels under a separate contract and that barrel materials and design are outside the scope of this contract.

The Air Force states that because it was assessing ARES' ability to successfully complete phase II, it reasonably could evaluate barrel design under phase I. The Air Force points out that the RFP required ARES to develop a detailed gun design during phase I which met the RFP requirements and that the detailed design "be sufficiently complete" and address certain gun firing requirements. Thus, although it recognizes that determining the type of material for the barrel was the subject of another contract and that the final design, fabrication and test of a barrel was postponed until phase II, the Air Force argues that ARES' ability to identify a barrel design and suitable material for the barrel was a reasonable basis for evaluation as it related to ARES' ability to perform phase II.

We find that the Air Force reasonably downgraded ARES concerning this area. Clearly, the RFP required sufficiently complete detailed gun design which reasonably covers the barrel. The record shows that the Air Force properly found that ARES failed to include in phase I information indicating a suitable barrel design and material sufficient to demonstrate its understanding and capability in this area. For example, since the steel barrels used by ARES in phase I testing had low barrel life and did not represent a workable design for continued development for use with the gun, we think the Air Force reasonably evaluated ARES' phase I performance and potential concerning barrel design and materials.

Finally, ARES objects to the downgrading of its proposal on the basis of "cost risk." The record indicates that ARES requested and received two payments, totaling $285,000 above its initial contract award, for cost overruns due to technical difficulties primarily with design and fabrication of its dynamic test fixture used in phase I testing. The record further shows that additional cost overruns were attributed to Ford but that the Air Force downgraded both prime contractors equally for Ford's poor phase I cost

performance. However, the Air Force downgraded ARES for the $285,000 which it concluded was solely due to ARES performance. The record indicates that although GE encountered the same problems with Ford, it met its test schedule without any significant increase in cost. In fact, GE's total overrun on phase I was approximately $240,000 less than ARES. The record further indicates that ARES original contract award was approximately $450,000 more than GE's contract. The evaluators also found that ARES had significant problems managing its in-house cost and concluded that ARES cost risk was "higher than moderate" for phase II.

ARES states that it disagrees with the assignment of "cost risk" on phase II based on its cost overruns in phase I, but provides no specific basis for its disagreement. Rather, ARES argues that even accepting the Air Force's position that ARES is responsible for the $285,000 in overruns, ARES' proposed phase II cost, adjusted on the basis of assuming the same cost growth experienced in phase I for phase II, is 32 percent lower than GE's. However, ARES has not shown why the Air Force improperly held ARES responsible for the $285,000 in cost overruns and we conclude that the agency properly evaluated and downgraded ARES for its actual phase I cost performance.

Based on the above, we find no impropriety in the Air Force's evaluation of ARES proposal. The record further indicates a rational basis for the Air Force's finding that GE's offer was technically superior and justified the additional cost of GE's offer. Generally, the record indicates that GE's phase I design work is more advanced technically and its proposed gun performed better under phase I testing.

As indicated previously, the record indicates that GE met and exceeded the design level firing rate of 6,000 spm. The record indicates that GE fired 204 rounds at rates above 5,400 spm, 59 rounds at about the 6,000 spm and attained a rate exceeding 6,125 spm. In contrast, ARES gun, according to the record, fired fewer than 5 of the 549 rounds at rates exceeding the 5,400 spm requirement.

With regard to barrel materials, the record indicates that GE proposed a different material than ARES and, by its phase I performance and analytical work, GE showed that its choice of an alloy has a more reasonable probability of satisfying phase II gun barrel burst length requirements and minimum size and weight requirements for the gun. The record indicates that the Air Force concluded ARES' use of conventional steel for its barrel, and its barrel design, was not suitable for phase II and that its analysis supporting its barrel design was insufficient to show phase II firing requirements could be met without difficulties with the barrel. In our

view, the Air Force reasonably concluded that GE's phase I barrel design and performance offered lower risks than did ARES'.

The record also supports the Air Force's conclusion that GE's muzzle device phase I performance and phase II potential was superior to ARES. The record shows GE's muzzle device performed well in phase I and was found to significantly reduce blast and recoil and provide torque assist. The record indicates ARES' muzzle device performance was weak, that the muzzle device designed could not be fully tested because the device caused "high pitching loads" on the interfacing barrel supports, and also that ARES failed to address the poor muzzle device performance or schedule further testing. Under these circumstances, the Air Force reasonably concluded that award to ARES would pose a significant project risk for the development of an effective muzzle device which would permit use of the gun on an aircraft.

With regard to management performance, GE was rated as less of a risk for phase II than ARES. Although both were downgraded for management of Ford's subcontract, the Air Force's record supports crediting of GE for its demonstrated ability to manage its in-house activity because its in-house activities were performed at or near its budgeted cost and on schedule. Also, GE was cited for its demonstrated in-house ability to provide technical advice and guidance concerning ammunition problems which might occur in phase II. In contrast, the record indicates that ARES failed to demonstrate these management skills. For example, the record indicates that ARES had unfavorable cost growth and schedule delays. Thus, we find the Air Force reasonably evaluated GE less of a risk for phase II based on its phase I management performance.

Finally, as previously discussed, considering the cost overruns attributable to the prime contractors, the record indicates that GE actually was more successful in limiting cost overruns than ARES for the work it performed in-house.

Based on this record, we find that the agency had a rational basis for concluding that award to GE was most advantageous to the government.

We deny the protest.

for Seymour Efros
Harry R. Van Cleve
General Counsel